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Rina Simanjuntak v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–256–09 OF 2014

MOHTARUDIN BAKI, TENGKU MAIMUN AND ABDUL RAHMAN SEBLI JJCA

4 FEBRUARY 2015

C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused charged for trafficking in 1929.3g of methamphetamine — Dangerous Drugs Act 1952 s 39B(2) — Drugs found concealed in compartment of bag — Accused convicted for charge and sentence to death — Defence of innocent carrier — Whether probable — Whether accused person drug mule — Whether prima facie case proven — Whether conviction and sentence safe

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The appellant was charged at the High Court for trafficking in 1929.3g of methamphetamine, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952. The drugs were found concealed in a compartment in a bag pack ('exh P15') which was recovered from a bag ('exh P14') carried by the appellant. At the end of the prosecution's case, the trial judge made the following findings on possession. The appellant's defence was that she had no knowledge of the drugs and was asked by her boyfriend ('Dr Jossy') to go to New Delhi to collect money and samples of children's clothes for him. When she was in room No 203 at Hotel International, New Delhi, a person came to her room and gave her exh P15 filled with new children's clothes in plastic wraps and also USD300. According to the appellant, Dr Jossy had asked her to hand carry exh P15, but the appellant found it too heavy. The appellant said because she wanted to be comfortable, she tried to put exh P15 into exh P14 but P15 could not fit into P14. The appellant emptied exh P15. She put the children's clothes into her bag P47. The appellant then placed the empty exh P15 right on top in exh P14. The court found that the appellant was not an innocent carrier but was possibly a drug mule. The appellant was thus convicted and sentenced to death. Hence, the present appeal. The issues raised before the court were that no prima facie case was proven; the trial judge erred in appying s 37A of the Act restrospectively; and the trial judge failed to fairly and justly weigh the defence version and the evidence of innocent carrier.

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Held, allowing the appeal; setting aside the conviction and sentence:

(1) The High Court judge found that s 37A was applicable as the trial commenced after s 37A came into effect. The correct approach was to consider the time of the commission of the offence and not the

commencement of the trial. The alleged offence was committed on 17 March 2013 while the amendment to insert s 37A came into effect on 15 February 2014. The trial judge therefore erred in His Lordship's retrospective application of s 37A, in breach of art 7 of the Federal Constitution which provided for protection against retrospective criminal laws (see para 13).

(2) The appellant did not display any conduct by which an inference could be drawn that the appellant had knowledge of the drugs in exh P15. His Lordship placed much reliance on the fact of concealment of the drugs. The trial judge however had failed to consider the documentary evidence adduced from the Yahoo Messenger Chat between the appellant and Dr Jossy for the period between May 2012–March 2013, disclosed relevant conversation between the appellant and Dr Jossy (see paras 17 & 21).

(3) Dr Jossy was not a fictitious character. The appellant's friend, Aida confirmed the existence of Dr Jossy. The trip to India was arranged by Dr Jossy. The appellant's flight itinerary was under the name of Dr Jossy (see para 23).

[Bahasa Malaysia summary

Perayu dituduh di Mahkamah Tinggi mengedar dadah methamphetamine sebanyak 1929.3g yang boleh dihukum di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('ADB'). Dadah diperolehi disembunyikan di dalam tempat di dalam beg ('lampiran P15') yang ditemui daripada beg ('lampiran P14') yang dibawa oleh perayu. Pada akhir kes pihak pendakwaan, hakim bicara membuat dapatan berikutan atas milikan. Pembelaan perayu adalah bahawa dia tidak mempunyai pengetahuan mengenai dadah dan disuruh oleh teman lelakinya ('Dr Jossy') pergi ke New Delhi untuk mengutip wang dan sampel pakaian kanak-kanak untuknya. Apabila dia berada dalam bilik No 203 di Hotel International, New Delhi, seorang datang ke biliknya dan memberi kepadanya lampiran P15 dipenuhi dengan pakaian baru kanak-kanak dalam bunkusan plastik dan juga USD300. Mengikut perayu, Dr Jossy menyuruh dia membawa lampiran P15, tetapi perayu mendapatinya berat. Perayu menyatakan oleh kerana dia hendak selesa, dia cuba hendak meletakkan lampiran P15 ke dalam P14 tetapi P15 tidak dapat masuk ke dalam P14. Perayu mengosongkan lampiran P15. Dia meletakkan pakaian kanak-kanak ke dalam begnya P47. Perayu kemudiannya meletakkan lampiran P15 yang kosong atas lampiran P14. Mahkamah mendapati bahawa perayu adalah pembawa tidak bersalah tetapi berkemungkinan pembawa dadah. Perayu oleh itu disabitkan dan dihukum mati. Maka, rayuan ini. Isu-isu berbangkit di hadapan mahkamah adalah bahawa tiada kes prima facie dibuktikan; hakim perbicaraan tersilap dalam menggunapakai s 37A ADB secara restrospektif; dan hakim mahkamah perbicaraan gagal untuk menimbang secara adil versi pembelaan dan keterangan pembawa tidak bersalah.

Diputuskan, membenarkan rayuan; mengetepikan sabitan dan hukuman:

(1) Hakim Mahkamah Tinggi mendapati bahawa s 37A boleh digunapakai sebagai perbicaraan bermula selepas s 37A berkuat kuasa. Pendekatan betul adalah untuk mempertimbangkan masa perlakuan kesalahan dan bukan permulaan perbicaraan. Kesalahan yang didakwa dilakukan pada 17 Mac 2013 sementara pemindaan untuk memasukkan s 37A berkuat kuasa pada 15 Februari 2014. Hakim perbicaraan oleh itu tersilap dalam permohonan retrospektifnya terhadap s 37A, memungkiri perkara 7 Perlembagaan Persekutuan yang memberikan perlindungan terhadap undang-undang jenayah retrospektif (lihat perenggan 13).

(2) Perayu tidak menunjukkan apa-apa kelakuan dengan di mana inferens dapat dibuat bahawa perayu mempunyai pengetahuan mengenai dadah dalam lampiran P15. Yang Arif banyak bergantung ke atas fakta persembunyian dadah tersebut. Hakim perbicaraan bagaimanapun telah gagal untuk mempertimbangkan keterangan dokumentar yang dikemukakan daripada Yahoo Messenger Chat di antara perayu dan Dr Jossy untuk tempoh di antara Mei 2012–Mac 2013, mendedahkan percakapan relevan di antara perayu dan Dr Jossy (lihat perenggan 17 & 21).

(3) Dr Jossy bukan karakter rekaan. Kawan perayu Aida mengesahkan kewujudan Dr Jossy. Perjalanan ke India diatur oleh Dr Jossy. Jadual penerbangan kapal terbang perayu di bawah nama Dr Jossy (lihat perenggan 23).]]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Legislation referred to

Dangerous Drugs Act 1952 ss 37A, 37(d), 39B(2)
Federal Constitution art 7

Selvi Sandrasegaram (Christy Lim with her) (Gooi & Azura) for the appellant.
Jasmee Hameeza bt Jaafar (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The appellant was charged at the High Court at Pulau Pinang for trafficking in dangerous drugs, to wit 1929.3g of methamphetamine, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act').

[2] The drugs were found concealed in a compartment in a bag pack exh P15. Exhibit P15 was recovered from a bag, exh P14, carried by the appellant. A

[3] At the end of the prosecution's case the learned trial judge made the following findings on possession (*rekod rayuan Jld* 1: pp 10–12): B

> Maka jelas disini bahawa hanya OKT seorang yang mempunyai kawalan dan jagaan ke atas, P15 yang dijumpai di dalam beg, P14 yang kemudiannya dijumpai dadah di dalamnya. Ini adalah atas alasan-alasan berikut:
>
> a) OKT sewaktu mula-mula dilihat hanya berseorangan; C
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> b) OKT sendiri yang membawa kedua-dua buah beg;
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> c) OKT sendiri yang membuka kombinasi beg P14;
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> d) beg, P14 adalah atas nama OKT seperti di beg tag P13;
>
> e) beg, P15 dijumpai di dalam beg, P14 yang kemudiannya dijumpai dadah tersembunyi di dalamnya. D
>
> Oleh itu elemen kawalan dan jagaan ekslusif terhadap dadah tersebut telah berjaya dibuktikan oleh pihak pendakwaan.
>
> Manakala bagi elemen sama ada OKT mempunyai pengetahuan tentang dadah tersebut atau tidak, rujukan harus dibuat kepada kes *Gunalan a/l Ramachandran & Ors v PP* [2004] 4 MLJ 489, para 31 seperti berikut: E
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> > Knowledge is to be inferred from the facts and the surrounding circumstances of the case.
>
> Cara dadah disembunyikan di dalam beg, P15 juga boleh menunjukkan pengetahuan. Kes *Teh Hock Leong lwn PP* [2008] 4 CLJ 764 Mahkamah Rayuan memutuskan bahawa: F
>
> > ... we agree with the learned trial judge that the method employed to bring the drugs in question from Thailand into Malaysia was done in a *most cunning fashion to escape detection by the authorities. The method employed to convey or transport a drug may sometimes furnish evidence of knowledge. For example, an attempt to carefully conceal a drug may indicate an intention to avoid detection and thereby point to knowledge*. Of course it all depends on the facts of each individual case. G
>
> Di dalam kes ini, pengetahuan OKT terhadap dadah tersebut telah dibuktikan melalui fakta dan juga keadaan sekeliling kes ('surrounding circumstances'). Cara dadah berbahaya disorokkan di dalam dua ruangan tersembunyi di dalam beg, P15 adalah untuk mengelak daripada dikesan oleh pihak berkuasa. H

[4] On trafficking, the learned trial judge said (*rekod rayuan Jld* 1: pp 13–16): I

> Definisi 'pengedaran' (trafficking) di bawah Seksyen 2 Akta, jika pihak pendakwaan dapat membuktikan OKT telah mengangkut dadah dari satu tempat ke satu tempat

A yang lain ianya akan terjumlah kepada perbuatan mengedar (trafficking).

...

Oleh itu, keterangan SP3 harus dirujuk di mana beliau pertama kali melihat OKT di Balai Ketibaan Domestik Lapangan Terbang Antarabangsa, Pulau Pinang. Jika B dilihat pada 'boarding pass' OKT (P206, P207 dan P208), ia menunjukkan bahawa OKT adalah daripada New Delhi ke Colombo, kemudian ke Kuala Lumpur dan seterusnya ke Pulau Pinang dengan menaiki penerbangan Sri Lankan Airlines UL 196 dan UL 318 serta penerbangan Malaysia Airlines MH 1140.

Ini telah menunjukkan bahawa OKT telah menyembunyikan (concealing) dan C membawa dadah tersebut di dalam beg, P15 yang berada di dalam beg, P14 dari satu tempat ke satu tempat yang lain. ...

Oleh itu perlakuan OKT yang membawa (transporting) dadah tersebut dari New Delhi ke Pulau Pinang, Malaysia menunjukkan beliau telah mengedar dadah tersebut. Juga dadah yang dibawa adalah dalam jumlah yang besar menguatkan lagi D keterangan bahawa OKT sememangnya telah mengedar dadah tersebut pada waktu yang material dan dadah tersebut bukan untuk kegunaan sendiri.

[5] The learned trial judge further said:

E Pihak pendakwaan juga secara alternatif boleh menggunakan anggapan milikan di bawah s 37(d) Akta dan anggapan pengedaran di bawah s 37(da) Akta. Anggapan berganda di bawah Muhammad Hassan tidak lagi terpakai kerana pindaan dan dimasukkan s 37A Akta (Application of Presumptions): lihat Akta Dadah Berbahaya (Pindaan) 2014 (Akta A1457) yang berkuatkuasa bermula pada F 14.2.2014 dan perbicaraan kes ini telah bermula pada 24.3.2014 selepas Akta A1457 berkuatkuasa.

[6] Having found that a prima facie case has been made out, the appellant was called upon to enter her defence.

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[7] The appellant gave evidence under oath. Her defence was that she had no knowledge of the drugs. She testified that she was asked by her boyfriend, one Dr Jossy to go to New Delhi to collect money and samples of children's clothes for him.

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[8] It was further the testimony of the appellant that when she was in room No 203 at Hotel International, New Delhi, a person came to her room and gave her exh P15 filled with new children's clothes in plastic wraps and also USD300 cash.

I

[9] According to the appellant, Dr Jossy had asked her to hand carry exh P15, but the appellant found it too heavy. The appellant said because she wanted to be comfortable, she tried to put exh P15 into her bag P14 but P15 could not fit into P14. The appellant emptied exh P15. She put the children's

clothes into her bag P47. The appellant then placed the empty bag pack P15 right on top in P14.

[10] The learned trial judge rejected the defence. In gist the reason was (*rekod rayuan Jld* 1: p 30):

> ... mahkamah ini mendapati pihak OKT bukanlah seorang 'innocent carrier' tetapi mungkin seorang keldai dadah ('drugs mule') yang dibayar wang dan mengetahui kewujudan dadah yang dibawanya. Oleh yang demikian, pihak pembelaan tidak berjaya menimbulkan sebarang keraguan yang munasabah dan seterusnya pengedaran sebenar di bawah s 2 Akta dan atau mematahkan anggapan berganda di bawah s 37(d) dan s 37(da) Akta di atas imbangan kebarangkalian yang mana tahapnya lebih berat dari menimbulkan keraguan yang munasabah.

[11] The appellant was thus convicted and sentenced to death, hence the appeal.

THE APPEAL

[12] Learned counsel for the appellant raised three issues as follows:

(a) no prima facie case in that knowledge was not proven;

(b) the learned trial judge erred in applying s 37A of the Act retrospectively; and

(c) the learned trial judge failed to fairly and justly weigh the defence version and the evidence of innocent carrier.

[13] We will deal with the second issue first, where the learned judge had applied the presumptions of possession and trafficking under s 37A of the Act which allows the application of double presumptions. His Lordship found that s 37A was applicable as the trial commenced after s 37A came into effect. With respect, the correct approach is to consider the time of the commission of the offence and not the commencement of the trial. The alleged offence was committed on 17 March 2013 whereas the amendment to insert s 37A came into effect on 15 February 2014. The learned trial judge therefore erred in His Lordship's retrospective application of s 37A, in breach of art 7 of the Federal Constitution which provides for protection against retrospective criminal laws.

ISSUE OF POSSESSION AND DEFENCE OF INNOCENT CARRIER

[14] The first and the third issues are related wherein in essence the submission of learned counsel was that the element of knowledge was not proven and that there was not a single strand of evidence pointing to the appellant's guilt.

[15] It was submitted that from the moment she was stopped by the officer on duty at the scanner machine ('SP3') to the interrogation by the investigating officer ('SP8'), the appellant's conduct was consistent with her being an innocent carrier. With no suspicious behaviour or reaction of the appellant, learned counsel submitted that there was no primary fact upon which the court can draw an inference of knowledge. Without knowledge, there is no possession and without possession, there is no trafficking as trafficking presupposes the existence of possession and possession presupposes the existence of knowledge. On this ground, it was argued that the appellant was entitled to an acquittal.

[16] It was further the submission of learned counsel that from the earliest available opportunity, the appellant had informed the customs officer ('SP7') that the bag exh P15 was not hers.

OUR FINDINGS

[17] The evidence disclosed that the appellant did not display any conduct by which an inference could be drawn that the appellant had knowledge of the drugs in exh P15.

[18] The evidence of SP3 stated:

> Semasa OKT meletakkan begnya di atas mesin pengimbas, dia berwajah tenang sahaja. Semasa OKT ambil beg yang keluar dari mesin pengimbas, dia masih berwajah tenang. Selepas OKT bercakap dengan Encik Azrul (SP5), dan Encik Azrul beritahu 'ada barang tersembunyi dalam beg galas, OKT nampak gelisah'.

[19] SP5 confirmed that only upon being informed that there was something suspicious concealed in the bag pack that the appellant became worried. While the evidence of SP7 was as follows (*rekod rayuan Jld* 1: p 69):

> Katakan: Setelah OKT diberitahu bahawa terdapat dadah dalam beg galas, P15 OKT telah berulang kali beritahu Encik James bahawa dia tidak tahu apa-apa mengenai dadah tersebut.
>
> Jawab: Saya setuju.
>
> Katakan: OKT ada memberitahu beg galas, P15 bukan dia punya.
>
> Jawab: Saya setuju.

In re-examination, SP7 said 'OKT sering kali memberitahu beg galas tersebut bukan kepunyaan'.

[20] SP8 testified that the appellant had informed SP8 that a person came to the appellant's hotel room with a bag filled with children's clothes. SP8 had also

stated that the appellant had told her about Dr Jossy and his instructions for the appellant to collect the clothes and the money.

[21] From the grounds of judgment of the learned trial judge, it was apparent that His Lordship placed much reliance on the fact of concealment of the drugs. The learned trial judge however had failed to consider the documentary evidence adduced from the Yahoo Messenger Chat (exh D218). The print-out of the conversation between the appellant and Dr Jossy for the period between May 2012–March 2013, disclosed relevant conversation between the appellant and Dr Jossy. For ease of reference, we reproduce the following conversation which took place on 12 March 2013 (*rekod rayuan Jld* 11: pp 334–335):

12 Mar 21.50 Rina Simanjuntak: What I'm doing in India?

12 Mar 21.50 dr.jossy6: to collect money for me

...

12 Mar 21.51 Rina Simanjuntak: Why I should going to Penang?

12 Mar 21:52 Rina Simanjuntak: what for

12 Mar 21:52 drjossy6: hold on, am on call

12 Mar 21:53 Rina Simanjuntak: Ok, I'm waiting

...

12 Mar 22:37 drjossy6: Because of the sample you will come back with, I will show it to the wholesalers that I am going to buy it from, and they are in Penang and I will be in Penang

12 Mar 22:38 Rina Simanjuntak: So you will pick me up

12 Mar 22:38 Rina Simanjuntak: Ok babe

12 Mar 22:38 drjossy6: yes babe, in penang.

[22] At p 350: *rekod rayuan Jld* 11:

15 Mar 16:53 Rina Simanjuntak: What time he will come babe?

15 Mar 16:54 Rina Simanjuntak: He come to my room or im going to the lobby

15 Mar 16:54 drjossy6: he will come to your room don't worry.[94]

Further, at pp 360–366:

15 Mar 19:31 Rina Simanjuntak: He is already at my room

...

15 Mar 19:34 drjossy6: take the bag and the money ok

15 Mar 19:42 Rina Simanjuntak: So he will come again?

15 Mar 19:42 drjossy6: not him

15 Mar 19:42 Rina Simanjuntak: Btw he already give me 300$

15 Mar 19:42 drjossy6: His Boss will bring $35,000 us dollars

...

15 Mar 19:47 drjossy6: the clothes and the bag is sample

...

15 Mar 19:48 Rina Simanjuntak: Very heavy babe

15 Mar 19:48 drjossy6: they want to give me contract to supply it by next 2 weeks

...

15 Mar 19:59 drjossy6: you will check koper inn in the flight, then ransel will be hand carry

...

15 Mar 20.01 Rina Simanjuntak: But the ransel was so heavy babe

15 Mar 20:01 drjossy6: make it hand carry.

[23] Dr Jossy was not a fictitious character. The appellant's friend, Aida (SD2) confirmed the existence of Dr Jossy. The trip to India was arranged by Dr Jossy. The appellant's flight itinerary was under the name of Dr Jossy (exh P212). As indicated by the exh P212, the itinerary was produced by the prosecution, upon investigations being done by SP8.

[24] The defence of innocent carrier was not an afterthought. The appellant had, at the earliest opportunity at the airport, informed SP7 that the bag was not hers. At the airport, the appellant had also sent a text message to Dr Jossy 'why u do this to me?' to which Dr Jossy replied 'what'. During the trial, the defence was suggested to the prosecution witnesses. The suggestions had crystallised into evidence when the appellant testified on oath.

[25] The conduct of the appellant and the conversation in exh D218 was consistent with the appellant's version that she went to India to collect the samples of children's clothes and money for Dr Jossy. The conversation disclosed nothing on her knowledge about the drugs in the compartment of exh P15. In our judgment, exh D218 has rebutted the presumption of knowledge under s 37(d) of the Act, invoked by the learned trial judge and exh D218 has also cast a reasonable doubt on whether the appellant had knowledge of the drugs in exh P15.

[26] In the circumstances, we found merits in the issues raised by learned counsel. We unanimously allowed the appeal. We set aside the conviction and sentence. The appellant was acquitted and discharged.

Appeal allowed; the conviction and sentence set aside.

Reported by Afiq Mohamad Noor